Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

HOWARD BARTON, LARRY BARNES, JACK UGAKI and BRIAN WARDLE,

Petitioners,

v.

GLENDA SMITH AND RAY MARTIN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a party is entitled to a jury trial for a cause of action brought under § 504 of the Rehabilitation Act of 1973 which prohibits discrimination against the handicapped in any program or activity receiving federal financial assistance.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Howard Barton, Larry Barnes, Jack Ugaki and Brian Wardle.

The respondents before this Court include Glenda Smith and Ray Martin.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners Howard Barton, Larry Barnes, Jack Ugaki and Brian Wardle respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 19, 1990. Petition for Rehearing denied, December 19, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 914 F.2d 1330, and is reprinted in the Appendix hereto as No. 2, *infra*.

The memorandum decision of the magistrate for the United States District Court for the District of Idaho (Williams, magistrate) has not been reported. It is reprinted in the Appendix hereto as No. 5, *infra*.

JURISDICTION

Federal jurisdiction was invoked under 28 U.S.C. § 1343(4) when the respondents brought this suit in the District Court for the District of Idaho on September 21, 1984. Summary judgment denying a jury trial to respondents was granted on December 31, 1987.

On respondents' appeals, the Ninth Circuit on September 19, 1990, entered a judgment and an opinion reversing the decision and judgment of the district court and remanding for trial by jury.

On October 1, 1990, a petition for rehearing with suggestion for hearing *en banc* was filed which was denied on December 19, 1990.

The jurisdiction of this Court to review the judgment and order of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 794(a).

> (a) *Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees.* No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

STATEMENT OF THE CASE

The Plaintiffs in this action, Smith and Martin, who are legally blind, were employees of the Idaho Commission for the Blind. The Commission is an Idaho state agency which receives state and federal funding. Prior to 1984, Smith and Martin each served as chiefs of two divisions for the Commission. Both were also active members of the National Federation of the Blind. The Defendants were, in 1984, members of the Commission.

In July of 1984, a reorganization of the administrative structure of the Idaho Commission for the Blind was undertaken by the members of the Commission.

As a result of this reorganization, the two positions held by Plaintiffs were consolidated into one new position. Under the reorganization plan, Plaintiffs were offered substitute jobs at their previous salary level, but would be designated as staff personnel. Both Plaintiffs were also invited to apply for the new position, which they did. A third individual was eventually hired for the new position, and Plaintiffs sued in the federal district court.

Plaintiffs alleged in their suit that the reorganization of the Idaho Commission for the Blind constituted a constructive discharge due their handicap, in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1990) (the Rehabilitation Act). Plaintiffs also brought a second cause of action under Title 42 U.S.C. § 1983 contending that the reorganization was undertaken as a retaliation for Plaintiffs' membership in the National Federation for the Blind and that the constructive discharge violated their First Amendment rights of free association and free speech, along with their Fourteenth Amendment rights to due process and equal protection under the law.

A summary judgment motion was ultimately granted against Plaintiffs, which dismissed Plaintiffs' constitutional claims brought under § 1983 on the basis that these claims were precluded by the Rehabilitation Act. The magistrate also determined that Plaintiffs were not entitled to a jury trial on their claims under § 504.

A bench trial resulted in a determination that the Plaintiffs failed to establish a *prima facie* case of discrimination under the Rehabilitation Act. Appeal was taken to the Ninth Circuit, which reversed and remanded, holding that Plaintiffs' cause of action under 42 U.S.C. § 1983 was not precluded by the Rehabilitation Act.

Additionally, the court held that the magistrate erred in denying Plaintiffs a jury trial on their claims brought under § 504 of the Rehabilitation Act. As the basis for the question raised in this Petition, the court's rationale on this issue warrants discussion.

The court first examined the statutory language of § 504 pursuant to *Tull v. United States*, 481 U.S. 412 (1987) to determine if the statute itself expressed any intent to grant a jury trial. The court found the statute silent. Next, decisions from other circuits were considered. This authority supported the proposition that no right to a jury trial existed under § 504. The court then looked to the remedies, procedures and rights available under Title VI of the Civil Rights Act which, by statute, apply to violations of § 504. The statutory language of Title VI was also found silent on the issue. Case law cited by the court, which interpreted Title VI, again supported the proposition that no right to a jury trial existed.

For additional guidance, the court examined cases interpreting Title VII of the Civil Rights Act. The similarities between Titles VI and VII have yielded a body of case law which has looked to Title VII in an effort to discover the rights and procedures available under Title VI. The court noted that generally no right to a jury trial under Title VII has been granted. As a result of this

analysis, the court concluded that no statutory entitlement to jury trial existed in § 504 cases.

The court then entered a Seventh Amendment analysis to determine the necessity of a jury trial. Following *Tull v. United States, supra,* the court's inquiry focused on ascertaining first whether the action in question was closer to one sounding in law or equity. This factor proved to be nondeterminative. The common law tort action to enforce employment contracts to which this suit was analogous, could be either legal or equitable. The court then confronted the second part of the *Tull* Seventh Amendment analysis. This was the characterization of the relief sought by respondents to determine if it was either legal or equitable.

It was noted by the court that respondents sought both injunctive and compensatory damages as relief. The court recognized that, while compensatory damages are traditionally legal, they may, as stated in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* ___ U.S. ___, 110 S.Ct. 1339 (1990), constitute equitable relief when they are incidental to or intertwined with injunctive relief. *Id.* at 1348. The court, however, found the monetary damages sought by respondents to be legal in nature and not merely incidental to the injunctive relief sought. In supporting this interpretation, the court paid particular importance to a finding that money damages were available in the Ninth Circuit for violations of § 504. This conclusion was based upon the two Ninth Circuit cases of *Kling v. County of Los Angeles,* 769 F.2d 532 (9th Cir. 1985) and the case of *Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103 (9th Cir. 1987).

The court concluded that because money damages were sought and because that remedy was available, the respondents, under the Seventh Amendment, were entitled to a jury trial on their claims under § 504.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's ruling granting a jury trial is (a) beyond the procedures available under § 504 of the Rehabilitation Act, codified as 29 U.S.C. § 794, and (b) conflicts with decisions of this Court and other circuits.

In its opinion overturning the judgment of the district court, the Ninth Circuit has provided respondents with a procedural mechanism exceeding that provided by the statute under which suit was brought. By ruling that respondents are entitled to a jury trial for a cause of action under § 504 of the Rehabilitation Act, the Ninth Circuit has unilaterally expanded the procedures and remedies available to a litigant beyond those established by Congress and this Court. Private litigants as a result of this ruling may circumvent the limitations of this Act and significantly expand the number of jury trials held in the federal courts. This drastic change in the procedures of suits under § 504 deserves the attention of this Court.

The provisions of Title VI do not contain a grant of a jury trial. The Ninth Circuit was correct in the opinion below in so recognizing. The Ninth Circuit was incorrect, however, in determining that as an available procedure for the relief sought respondents were mandated a jury trial. The court below adopted a rationale based upon the Seventh Amendment. It was determined that the

remedies sought by respondents were legal in nature and, as a result, required the granting of the right to a jury trial. The creation of this right under § 504 by the Ninth Circuit is in error and conflicts in principle with this Court's rulings in the cases of *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) which have only allowed equitable relief under this statute.

The available relief for a cause of action under § 504, as provided by § 505(a)(1) of the Act, are those remedies, procedures and rights set forth in Title VI of the Civil Rights Act. These are enumerated in 42 U.S.C. 2000d, *et seq*. The relief which is available under these provisions is equitable and does not entitle respondent to a jury trial.

The furthest which this Court has gone is the allowance of an award for backpay in *Guardians Ass'n* and *Consolidated Rail*. This was determined to be an equitable damage recovery, 463 U.S. 601; 465 U.S. 630. As indicated in *Guardians Ass'n*, by this Court's own examination of the Congressional Record, in regards to the enforcement of Title VI, "Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." 463 U.S. at 601. The decision below, with its Seventh Amendment analysis, is in conflict with these cases which recognize the limited equitable form of the remedies available under the Rehabilitation Act and Title VI.

This new interpretation by the Ninth Circuit that damages outside of compensatory equitable relief are available and may constitute a basis for awarding a jury trial is also in conflict with the determination of other

federal courts. A number of Circuits have properly acknowledged the limitations of relief under § 504 and Title VI to that of an equitable nature. These jurisdictions, in following *Consolidated Rail* and *Guardians Ass'n*, have concluded that the damages or monetary relief awardable under § 504 and Title VI do not include general damages or damage relief beyond that which is equitable. There is no available legal relief under this statute upon which to base a grant of a jury trial. *Sinault v. American Airlines, Inc.*, 738 F.Supp. 193 (S.D.Miss. 1990); *Marshburn v. Postmaster General*, 678 F.Supp. 1182 (D.Md. 1988), *aff'd*, 861 F.2d 263 (4th Cir. 1988); *Shuttleworth v. Broward County*, 649 F.Supp. 35 (S.D.Fla. 1986); *Duvall v. Postmaster General*, 585 F.Supp. 1374 (D.D.C. 1984), *aff'd*, 774 F.2d 510 (D.C. Cir. 1984); *Martin v. Cardinal Glennon Memorial Hospital for Children*, 599 F.Supp. 284 (E.D.Mo. 1984).

This determination by other federal courts as to limited nature of the available relief has resulted in the denial of a right to a jury trial in other circuits for an action brought under § 504. The Ninth Circuit opinion below now directly conflicts with the determinations of these other federal decisions. This Court must step in and resolve this controversy regarding this now-contested right to a jury trial. In *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983), the Fifth Circuit rejected the allowance of a jury trial as a matter of right under § 504. Such disallowance has also occurred in the District Court for the Eleventh Circuit in the case of *Shuttleworth, supra*, as well as the District Court for the Eighth Circuit in *Giles v. EEOC*, 520 F.Supp. 1198 (E.D. Mo. 1981); and in the Seventh Circuit by implication in *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971).

The Ninth Circuit's confusion regarding the question of available remedies is also evident from the precedents relied upon below for the determination that nonequitable damage recoveries were previously awarded in the Ninth Circuit. The cases cited below indicate a reliance upon the limited equitable recovery available under the statute and pursuant to the court's *Consolidated Rail* decision. These Ninth Circuit cases, *Kling v. County of Los Angeles*, 769 F.2d 532 (9th Cir. 1985) and *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987), provide examples of monetary relief awarded as part of or in conjunction with earlier injunctive relief with no indication that the court would have allowed damages solely of a legal nature. The Ninth Circuit has not previously rejected the limitation of *Consolidated Rail* and these decisions do not support a determination that the relief at issue then, would itself, have been a sufficient basis for a jury trial.

Further, the decision rendered by the Ninth Circuit also conflicts in principle with this Court's rulings in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, ___ U.S. ___, 110 S.Ct. 1339 (1990); *Lehman v. Nakshian*, 453 U.S. 156 (1981); *Great American Savings & Loan Ass'n v. Novotry*, 442 U.S. 366 (1979) and *Lorillard v. Pons*, 434 U.S. 575 (1978). In these cases, this Court indicated that, under Title VII, which has been used as a guide for interpreting the rights and procedures of Title VI, no right to a jury trial exists.

This denial of a jury trial for actions brought under Title VII has also been uniform throughout other federal courts; *e.g.*, District Court for the Second Circuit: *Miller v. A, T & T Co.*, 18 F.E.P. 62 (S.D.N.Y. 1978); District Court

for the Third Circuit: *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977); District Court for the Fourth Circuit: *Smith v. Hampton Training School for Nurses*, 300 F.2d 577 (C.A. 4th 1966) (*en banc*); District Court for the Fifth Circuit: *Caromes v. J. C. Penney & Co.*, 19 F.E.P. 298 (S.D.Fla. 1979); District Court for the Sixth Circuit: *Chia v. Michigan Technical University*, 493 F.Supp. 1137 (W.D.Mich. 1980); Seventh Circuit: *Grayson v. Wickes Corp.*, 607 F.2d 1194 (7th Cir. 1979).

So too for the Ninth Circuit whose statement of this rule provided authority for this Court. In the case of *Great American, supra*, this Court cited *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975) as authority for the proposition that consistently it has been held that no right to a jury trial existed with such Title VII claims. The interpretation given Title VII has direct application to the procedures of Title VI. The denial of a jury trial under Title VII, which has been based both on the language found in the statutes and the equitable nature of the remedies available under this Title, precludes a determination that a right to a jury trial exists for respondents with their § 504 claim.

The decision below, in its extension of the procedures available for actions brought under § 504, is in contrast to the previous rulings of this Court and other Circuits interpreting Title VI and Title VII which have determined that the relief available to petitioners is solely equitable. The analysis performed by the Ninth Circuit, done under the rubric of the Seventh Amendment, is incorrect in its conclusion that a right to jury trial exists based on an interpretation that petitioners sought relief legal in character. Such relief has not been determined by this Court to be available under § 504 of the Rehabilitation Act. The

justification for the decision by the court below cannot stand.

Additionally, the court below ignored an important argument which precludes a determination that legal relief was sought by respondents. Under the Eleventh Amendment, such relief would not be available to respondents in this case. While sued individually, the petitioners were, as officials acting within their official capacity, entitled to qualified immunity under the Eleventh Amendment. Pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Edelman v. Jordan*, 415 U.S. 651 (1974), they would be immune from suit for any damage relief compensatory in nature. The Eleventh Amendment immunity precludes this type of damage recovery and vitiates any Seventh Amendment rationale for granting a jury trial. If respondents are prohibited from recovering such "legal remedies," then their alleged existence cannot mandate a need for a jury trial.

A last point must be raised that the court below failed in its interpretation of the rights available under § 504 to reconcile the conflict of granting a jury trial with the limitation imposed by this Court in *Granfinanciera S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989), upon actions involving a public right. The rights at issue under § 504 as part of a regulatory scheme enacted by Congress are strictly statutory. They constitute public rights and, even if determined to give rise to remedies legal in nature, may be adjudicated without a jury as determined by this Court in *Granfinanciera* and *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). The Seventh Amendment does not mandate a jury trial when such public rights are at issue.

CONCLUSION

The Ninth Circuit has, as a result of its ruling below, created precedent which is likely to create additional confusion among the Circuits. As precedent, it conflicts in principle with the Court's determination in *Consolidated Rail* and the limitation which exists on the remedies available under § 504 of the Rehabilitation Act. A jury trial is not mandated even under the Seventh Amendment when the remedies available are equitable in character. For these reasons, this Petition for Certiorari should be granted. It is essential that this Court consider the issue of whether a right to jury trial must be granted respondents for their cause of action brought under § 504 of the Rehabilitation Act.

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENDA SMITH AND RAY MARTIN, Plaintiff-Appellant, v. HOWARD BARTON, LARRY BARNES, JACK UGAKI, AND BRIAN WARDLE, Defendants-Appellees,	No. 88-4230 D.C. No. 84-1392 ORDER FILED DEC 19 1990

Before: BROWNING and FLETCHER, Circuit Judges, and REED,* Chief District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehearing [sic] the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Edward C. Reed, Jr., Chief District Judge, District of Nevada, sitting by designation.

APPENDIX 2

Glenda SMITH and Ray Martin,
Plaintiffs/Appellants,

v.

Howard BARTON, Larry Barnes, Jack Ugaki, and Brian Wardle,
Defendants/Appellees.

No. 88-4230.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 3, 1989.
Decided Sept. 19, 1990.

Frederick S. LeClercq, Knoxville, Tenn.; for plaintiffs/appellants.

Richard L. Stubbs, Quane, Smith, Howard & Hull, Boise, Idaho, for defendants/appellees.

Appeal from the United States District Court for the District of Idaho.

Before BROWNING and FLETCHER, Circuit Judges, and REED,* District Judge.

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* Honorable Edward C. Reed, Jr., Chief United States District Judge for the District of Nevada, sitting by designation.

EDWARD C. REED, Jr., Chief District Judge:

OVERVIEW

This is an action for damages, injunctive and declaratory relief brought by Glenda Smith[1] and Ray Martin. Smith and Martin were former employees of the Idaho Commission for the Blind (the "Commission"). They contend that a restructuring of the Commission, whereby both plaintiffs lost their jobs, violated their rights under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1990) (the "Rehabilitation Act"). Further, plaintiffs brought claims under 42 U.S.C. § 1983 for alleged violations of their First Amendment right to free association. Plaintiffs appeal from the magistrate's decision[2] granting defendants' motion for summary judgment and dismissing plaintiffs' section 1983 claims. In addition, plaintiffs contend that the magistrate erred in denying them relief on their claims of handicap discrimination under the Rehabilitation Act, in denying them a jury trial, and in excluding a newly discovered audiotape and transcript of a meeting of the Commission.

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[1] Frank Smith, plaintiff below, died following the commencement of this litigation. His spouse, Glenda Smith, as personal representative of his estate, was substituted as a party plaintiff. Subsequent references in this order to "Smith" shall be to Frank Smith.

[2] The parties consented to have Magistrate Williams try the case.

FACTS

Plaintiffs Smith and Martin, both totally blind, were former employees of the Commission. The Commission is an Idaho state agency that receives state and federal funding. Smith formerly served as Chief, Field Services; Martin was employed as Chief, Orientation and Adjustment Center. Both Smith and Martin were active members of the National Federation for the Blind ("NFB").

Defendants Howard Barton, Larry Barnes, and Brian Wardle are all former members of the Commission. Defendant Jack Ugaki is a current member of the Commission. All defendants, except Wardle, are sighted. During July 1984, Defendant Barton spearheaded a reorganization plan that consolidated the positions held by plaintiffs and created a new position, Chief of Rehabilitation Services. Barton justified the reorganization on grounds that the new structure would be more efficient and would prevent federal and state funding cutbacks. The reorganization was approved by defendants Barnes, Ugaki, and Wardle. Plaintiffs were informed that under the reorganization they would continue to be employed at their present salary, but as staff personnel. Plaintiffs were invited to apply for the newly-created position of Chief of Rehabilitation Services, and both did, in fact, apply. Edward Easterling ultimately was appointed to fill the new position.

Plaintiffs' complaint, filed September 21, 1984, raised two basic claims for relief, both arising from the same actions of defendants. First, counts I and II alleged that

the reorganization of the Commission constituted constructive discharge because of their blindness, in violation of section 504 of the Rehabilitation Act. Second, counts III and IV alleged that the reorganization was a retaliatory measure instituted because of their membership in the NFB. Therefore, plaintiffs' second theory was brought under 42 U.S.C. § 1983, on grounds that the reorganization/constructive discharge also violated their First Amendment right of free association and their Fourteenth Amendment rights to due process and equal protection under the law.[3]

The magistrate granted summary judgment dismissing plaintiffs' constitutional claims brought under 42 U.S.C. § 1983, on the ground that they were precluded by the Rehabilitation Act. Denying plaintiffs' timely demand for a jury trial, the magistrate conducted a bench trial on the merits of defendants' alleged violation of section 504 of the Rehabilitation Act. By findings of fact and conclusions of law entered August 1, 1988, the magistrate found that plaintiffs had failed to establish a *prima facie* case of discrimination under Rehabilitation Act. The magistrate simultaneously entered an order denying plaintiffs' post-trial motion to admit a newly discovered audiotape and transcript of a Commission meeting that was conducted on September 5, 1984.

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[3] The only First Amendment violation alleged in Counts III and IV of plaintiffs' complaint is their right to freedom of association. It does not appear that the complaint was ever amended to include a free speech claim. However, the magistrate's order granting summary judgment suggests that plaintiffs also alleged a violation of their right to free speech.

DISCUSSION

I. PRECLUSIVE EFFECT OF THE REHABILITATION ACT

A. *Standard of Review*

A magistrate's grant of summary judgment is reviewed *de novo*. *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir.1989). The reviewing court shall view the evidence in the light most favorable to the non-moving party to determine whether the substantive law was applied correctly and whether there was any issue of material fact. *Id. See also Liberty Bank of Montana v. Travelers Indem. Co. of America*, 870 F.2d 1504, 1505-06 (9th Cir.1989).

B. *Analysis*

Section 504 of the Rehabilitation Act prohibits discrimination against the handicapped in any program or activity receiving federal financial assistance. It provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) [29 U.S.C. § 706(8)], shall solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794 (Supp.1989).

42 U.S.C. § 1983 provides a remedy for violations of rights secured by the Constitution or federal statutes, where such violations were committed under color of

state law.[4] *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir.1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987).

In *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the Supreme Court announced the general rule that a section 1983 claim could be predicated solely on a violation of a federal statute. *Id.* at 4-8, 100 S.Ct. at 2504-06. In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) the Court reiterated two exceptions to the general rule of *Thiboutot*. Of particular relevance here, the Court held that a section 1983 claim, based solely on a violation of a federal statute, does not lie where Congress has foreclosed a section 1983 remedy through a sufficiently comprehensive remedial and enforcement apparatus in the underlying federal statute. *Middlesex*, 453 U.S. 1, 19-20, 101 S.Ct. 2615, 2625-26, 69 L.Ed.2d 435 (1981) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545, 67 L.Ed.2d 694 (1981)).

Relying on *Middlesex*, the magistrate found that the Rehabilitation Act provided a sufficiently comprehensive

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[4] 42 U.S.C. § 1983 provides in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

. . . .

remedy to demonstrate congressional intent to supplant section 1983 claims, and therefore granted summary judgment dismissing plaintiffs' First Amendment claims. Defendants urge the same conclusion from this Court.

1. *"Could Have Been Brought"*

The magistrate's conclusion that plaintiffs' section 1983 claims were barred by the Rehabilitation Act is erroneous for two reasons. First, the doctrine of *Middlesex* only bars section 1983 claims that *could have been brought* under a separate federal statute which provides remedial devices sufficiently comprehensive to demonstrate a congressional intent to preclude section 1983 claims. Plaintiffs' First Amendment claims could not have been brought under the Rehabilitation Act because they allege violations that are unrelated to issues of handicap discrimination.[5] Indeed, plaintiffs' 1983 claims are not predicated on violations of a federal statute at all, but on alleged violations of their rights under the First Amendment.

The alleged injuries suffered by plaintiffs are unrelated to their status as handicapped individuals. Their section 1983 claims allege that they suffered injury because of their activities, rather than because of their handicap. Indeed, plaintiffs argue that they suffered two separate injuries, arising from two distinct discriminations: discrimination on account of their blindness, in

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[5] It is arguable that the magistrate's analysis justified dismissal of plaintiffs' due process and equal protection claims. However, this court need not address this issue, because plaintiffs have not appealed the dismissal of their due process and equal protection claims.

violation of the Rehabilitation Act, and discrimination on account of the exercise of their rights of free association and speech, in violation of the First Amendment. Although the NFB deals with concerns of the blind, free association and speech claims ought not to be foreclosed by the Rehabilitation Act, since the claims raise issues distinct from the right of blind people to be free from discrimination.

Furthermore, the authority relied on by the magistrate and cited by defendants is distinguishable from the case at bar.[6] Defendants primarily rely on *Tyus v. Ohio Dept. of Youth Serv.*, 606 F.Supp. 239 (S.D. Ohio 1985), for the proposition that plaintiffs' First Amendment section 1983 claims are precluded by the Rehabilitation Act.

In *Tyus*, the plaintiff was a former employee of the Ohio Department of Youth Services, who alleged that he was terminated from his employment because he suffered from epilepsy. *Id.* at 241. He brought claims alleging violations of section 504 of the Rehabilitation Act, and his Fourteenth Amendment rights of due process and equal protection. Relying on *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), the *Tyus* court ruled that the Rehabilitation Act is sufficiently comprehensive to preclude suits under section 1983, "on either statutory or constitutional grounds, based upon claims that could be brought under the provisions of the Rehabilitation Act." *Tyus*, 606 F.Supp. at 244. The court went on to point out that plaintiff's section 1983 claim, brought pursuant to

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[6] This Circuit has not ruled previously on the preclusive effect of the Rehabilitation Act.

the due process and equal protection clauses, was based on the same alleged injury as was plaintiff's Rehabilitation Act claim. *Id.*

In contrast to *Tyus*, the section 1983 claims presented in the case at bar could not have been brought under the Rehabilitation Act. The constitutional claims allege discrimination based on plaintiffs' association with the NFB, and retaliatory reorganization/constructive discharge precipitated by plaintiffs' outspoken support of the NFB and because of plaintiffs' pending lawsuit against defendants. These alleged injuries are not protected under the Rehabilitation Act, since the Rehabilitation Act "simply prevents discrimination on the basis of handicap." *Smith v. Robinson*, 468 U.S. at 1016, 104 S.Ct. at 3471. Plaintiffs' First Amendment claims do not raise handicap discrimination issues; they present alleged violations of rights possessed by all citizens, *i.e.*, the right to engage in protected First Amendment activities. The section 1983 claims require different proof from that required to prove discrimination under the Rehabilitation Act on the basis of plaintiffs' blindness.

2. *Comprehensive Remedial Structure*

The magistrate's conclusion that section 504 precludes plaintiffs' section 1983 claims also is erroneous because the Rehabilitation Act does not contain a remedial structure sufficiently comprehensive to evince congressional intent to preclude section 1983 claims based on the First Amendment. Indeed, whether the remedial structure of the Rehabilitation Act demonstrates congressional intent to preclude *any* section 1983 claims is a

matter of some disagreement. At least two lower courts have addressed the issue, and have permitted claims brought under both section 1983 and the Rehabilitation Act.[7] *See Rothschild v. Grottenthaler*, 716 F.Supp. 796, 801 (S.D.N.Y.1989) (Rehabilitation Act held to be "not so comprehensive as to [leave] no room for additional private remedies under section 1983") (internal citations omitted), *later proceeding*, 725 F.Supp. 776 (S.D.N.Y.1989); *Shuttleworth v. Broward County*, 639 F.Supp. 654, 659-60 (S.D.Fla.1986) (Rehabilitation Act held not to preclude actions brought under section 1983; court noted reluctance of Supreme Court to infer congressional intent to preclude reliance on section 1983). *Cf. Alexander v. Chicago Park Dist.*, 773 F.2d 850, 855-56 (7th Cir. 1985) (Title VI and VII only preclude actions under section 1983 that are "based on" those titles; "only if the right asserted was created by Title VII must it be vindicated through the procedural system set up in that Act"), *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986).

The rights plaintiffs seek to vindicate in their section 1983 claim were not created by section 504, but rather by the First Amendment. While there is disagreement over

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[7] In addition, although not expressly addressing the issue of whether the Act precludes claims under section 1983, several courts have recognized claims under section 1983 in cases that also were brought under the Act, thereby tacitly recognizing the propriety of such claims. *See, e.g., Pushkin v. Regents of Univ. Of Colorado*, 658 F.2d 1372, 1382 (10th Cir.1981) (in action brought under section 504 of the Rehabilitation Act and section 1983, court permitted claims under both statutes, and held that plaintiff was not required to exhaust administrative remedies under either statute).

whether Congress intended to foreclose section 1983 claims that could have been brought under the Rehabilitation Act, there is no indication that Congress intended to foreclose section 1983 claims that are unrelated to handicap discrimination. The Rehabilitation Act should not serve as a barrier to handicapped individuals who allege violations of their rights under the First Amendment.

The Magistrate erred in granting summary judgment on plaintiffs' section 1983 claim alleging violation of their First Amendment rights. We reverse that portion of the magistrate's judgment and remand for proceedings consistent with this opinion.[8]

II. RIGHT TO JURY TRIAL

A. *Standard of Review*

Whether section 504 of the Rehabilitation Act provides a right to a jury trial is a question of law, receiving

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[8] In ruling on plaintiffs' claims of handicap discrimination under section 504, the magistrate also found that the restructuring did not result from a conspiracy to rid the Commission of members of the NFB. Plaintiffs appeal this conclusion as well. It appears that the magistrate confused plaintiffs' allegations of handicap discrimination under section 504 with their free association claims under the First Amendment. The magistrate evaluated both claims without noting that a determination under section 504 of whether plaintiffs were denied the position "solely by reason of their handicap," requires a different analytical framework from that needed to determine whether plaintiffs were discriminated against because of their association with the NFB. Plaintiffs' free association claims should be evaluated, on remand, in light of prevailing First Amendment jurisprudence, and not under section 504.

de novo review. *United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir.1984) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

B. *Analysis*

Plaintiffs have requested a ruling on whether the Seventh Amendment right to a jury trial attaches to actions brought under section 504 of the Rehabilitation Act. However, before addressing the constitutional issue, we first analyze whether the statute itself expresses any intent to grant plaintiffs a jury trial. *See Tull v. United States*, 481 U.S. 412, 417 n. 3, 107 S.Ct. 1831, 1835 n. 3, 95 L.Ed.2d 365 (1987).

Section 504 is silent with regard to the availability of a jury trial. However, several courts addressing the issue have suggested that no right to a jury trial exists under section 504. *See, e.g., Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1407 n. 3 (5th Cir.1983) ("While we specifically do not decide this issue, jury trials do not appear to be a matter of right under the Rehabilitation Act of 1973"); *Shuttleworth*, 639 F.Supp. at 661 (no right to jury trial in section 504 case).

Because the "remedies, procedures, and rights" available under Title VI of the Civil Rights Act apply to violations of section 504,[9] we next look to Title VI to

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[9] Section 505(a)(1) of the amended Act, 29 U.S.C. § 794a(a)(2) (1985), provides:

> [t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

determine whether a jury trial right exists under that statute.[10] Title VI itself contains no grant of a jury trial. Furthermore, cases interpreting Title VI generally have found no such right. *See, e.g., Region 13 Mental Health,* 704 F.2d at 1407 n. 3 ("The 'remedies . . . and rights' available under title VI, like those under title VII, are essentially equitable in nature, and the 'procedures' available do not include juries").

For additional guidance, we look to cases interpreting Title VII: because of the similarities between Title VI and Title VII, courts frequently have looked to Title VII in determining rights and procedures available under Title VI. Although still open to some debate, courts generally have found no right to a jury trial under Title VII. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* ___ U.S. ___, 110 S.Ct. 1339, 1348, 108 L.Ed.2d 519 (1990) (noting that the Court has never held that a plaintiff seeking backpay under Title VII has a right to a jury trial, and "assuming, without deciding," that such a plaintiff does not have this right); *Lehman v. Nakshian,* 453 U.S. 156, 164, 101 S.Ct. 2698, 2703, 69 L.Ed.2d 548 (1981) (in determining that a plaintiff in an action against the United States under section 15(c) of the Age Discrimination in Employment Act of 1967 is not entitled to a jury trial, the Court noted in dicta that "there is no right to trial by jury in cases arising under Title VII"); *Slack v.*

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[10] *See generally Lloyd v. Regional Transp. Auth.,* 548 F.2d 1277, 1285-86 (7th Cir.1977), for a discussion of the similarities between Title VI and section 504 of the Rehabilitation Act. *Cf. Alexander v. Choate,* 469 U.S. 287, 293 n. 7, 105 S.Ct. 712, 716 n. 7, 83 L.Ed.2d 661 (1985) ("too facile an assimilation of Title VI law to Sec. 504 must be resisted").

Havens, 522 F.2d 1091, 1094 (9th Cir.1975) (no right to jury trial under Title VII).

Because neither section 504 nor title VI explicitly provides for a jury trial, and because the caselaw interpreting Title VI and Title VII generally has not found a right to jury trial in those cases, we conclude that there is no statutory entitlement to jury trial in section 504 cases. Therefore, we next must evaluate whether a jury trial is required by the Constitution itself.

The Seventh Amendment guarantees a jury trial "[i]n suits at common law, where the value in controversy shall exceed $20.00. . . . " When the right to a jury trial is invoked in an action based on a statute, as is the case here, *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), provides the appropriate analysis. There, the Court stated that the Seventh Amendment requires a jury trial on the merits in those actions that are "analogous to 'Suits at common law.' " *Id.* at 417, 107 S.Ct. at 1835. Determining whether statutory actions are "more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty," requires an analysis of both the nature of the action and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity (citations omitted). Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-18, 107 S.Ct. at 1835. The Court reiterated an earlier conclusion that the second inquiry, characterizing the relief sought, is "more important" than finding a precisely analogous common law cause of action. *Id.* at 421, 107 S.Ct. at 1837 (citing *Curtis v. Loether*,

415 U.S. 189, 196, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260 (1974)). *See also Terry*, 110 S.Ct. at 1345; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, ___, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989).

Although there were no discrimination actions at common law, plaintiffs' action is most closely analogous either to an 18th-century tort action or an action brought to enforce an express or implied employment contract. Such actions could have been brought in either courts of law or courts of equity, depending on the relief sought. *See generally* Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 Mo.L.Rev. 855, 858-862 (1983) (providing historical background of the employment-at-will doctrine, and the evolution of employee protection). Therefore, this first factor is not persuasive authority either for or against the jury trial, and "leaves us in equipoise as to whether [plaintiffs] are entitled to a jury trial." *Terry*, 110 S.Ct. at 1347. However, the second prong of the *Tull* analysis convinces us that plaintiffs are entitled to a jury trial on their section 504 claims.

The second, and more important factor, requires analysis and characterization of the relief sought by plaintiffs. In addition to seeking injunctive and declaratory relief, which relief here would be equitable in nature, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 102 S.Ct. 1798, 1802, 72 L.Ed.2d 91 (1982) (injunction), *and United States v. New Mexico*, 642 F.2d 397 (9th Cir.1981) (declaratory judgment), plaintiffs also seek compensatory money damages. Money damages are "the traditional form of relief offered in the courts of law." *Curtis*, 415 U.S. at 196, 94 S.Ct. at 1009. The award of monetary relief is not necessarily

always legal. *Id.* For example, damages may be equitable where they are restitutionary, "such as in 'action[s] for disgorgement of improper profits,' " *Terry*, 110 S.Ct. at 1348 (quoting *Tull*, 481 U.S. at 424, 107 S.Ct. at 1839).

However, the damages sought here are not merely incidental to or intertwined with injunctive relief, as are front pay and back pay, in which case they may be equitable.[11] *See Terry*, 110 S.Ct. at 1348. Although plaintiffs have requested injunctive relief, their request for damages is not incidental to that relief. They have sought damages to compensate them for their alleged loss of job responsibilities, status, and administrative leadership occasioned by defendants' actions. Monetary compensation for those losses would be in addition to, and distinct from, injunctive reinstatement. Therefore, because the remedies plaintiffs seek have "none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable," we conclude that the remedies sought are legal. *Id.* at 1348.

Furthermore, money damages are available in the Ninth Circuit for violations of section 504. For example, in *Kling v. County of Los Angeles*, 769 F.2d 532, 534 (9th Cir.1985), the Ninth Circuit relied on *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984) in awarding damages for a section 504 violation. Although *Kling* was reversed on other grounds, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed.2d 277 (1985), this position was later reaffirmed in *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 (9th Cir.1987).

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[11] We note that plaintiffs have not requested either front pay or back pay.

There, the court stated that plaintiffs suing under section 504 of the rehabilitation act "may pursue the full panoply of remedies, including equitable relief and monetary damages." This leaves little room for doubt as to the viability of that remedy in this circuit.[12]

Because money damages were sought in this case, and because that remedy is available in the Ninth Circuit, we conclude that the Seventh Amendment does entitle plaintiffs to a jury trial on their claims under section 504, and the magistrate erred in denying plaintiffs such right.

We emphasize that plaintiffs are not entitled to a jury trial merely because they brought claims under section 504. First, section 504 itself does not provide such a right, and the few cases addressing this issue have found that no such right exists under section 504. Second, most courts agree that there is no right to a jury trial under either Title VI or Title VII, both of which are used as guides for determining rights and privileges under section 504. Rather, plaintiffs' right to jury trial arises from the Seventh Amendment, because they seek relief that is

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[12] The Supreme Court has not decided "the extent to which money damages are available under Sec. 504," *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630, 104 S.Ct. 1248, 1252, 79 L.Ed.2d 568 (1984), although in *Darrone* the Court did apply title VI jurisprudence to a section 504 claim and authorize an award of backpay. In *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), at least five members of the Supreme Court concluded that compensatory relief probably is not available under Title VI, absent proof of discriminatory intent. Relying on *Guardians*, the Fifth Circuit has held that section 504 does not provide for damages in the absence of intentional discrimination. *See Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir.1983).

legal in nature. Section 504 "actions seeking only equitable relief will be unaffected, and preliminary injunctive relief remains available without a jury trial even in damage actions." *Curtis*, 415 U.S. at 198, 94 S.Ct. at 1010.

III. SECTION 504

Our determination that plaintiffs were erroneously denied a jury trial obviates the need for us to reach the other issues on appeal. However, in order to provide some guidance in the retrial of plaintiffs' claims under section 504, we include a brief analysis of the relevant law.

The Rehabilitation Act was the first major federal statute designed to protect the rights of and provide assistance to the handicapped people of this country. The version of section 504 in effect at the time plaintiffs sued states that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794. The statute has been construed to provide a private right of action under section 504. *See, e.g., Zolin*, 812 F.2d at 1107; *Kling v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir.1980). Furthermore, administrative remedies, which result in suspension or termination of the federal assistance to the institutional recipient, do not afford individual complainants adequate relief. Therefore, private plaintiffs suing under section 504 need not first exhaust administrative remedies. *Kling*, 633 F.2d at 879.

To prevail in a case brought under section 504, a plaintiff must show that the plaintiff is:

(1) a handicapped person under the Act;

(2) otherwise qualified for the position sought;

(3) being excluded from the position solely by reason of plaintiff's handicap; and

(4) seeking a position that exists as part of a program or activity receiving federal financial assistance.

Doe v. New York Univ., 666 F.2d 761, 774-75 (2nd Cir.1981). *See also Zolin*, 812 F.2d at 1107; *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621 (9th Cir.1982).

The magistrate found, and the parties do not contest, that plaintiffs were handicapped individuals under the Act, that they were otherwise qualified for the newly created position, Chief of Rehabilitation Services, and that the position existed as part of a program or activity receiving federal financial assistance. However, the magistrate found that plaintiffs had failed to establish the third criterion, i.e., that they were excluded from the position solely by reason of their handicap. This case is unusual in that the defendants disavow any reliance on plaintiffs' handicap.

Most section 504 suits are brought by plaintiffs who have been denied a job or some other benefit as a consequence of a classification or disqualification based on disability or perceived disability. B.L. Schlei & P. Grossman, *Employment Discrimination Law* 281 (2d ed. 1983). Consequently, most judicial and academic attention has been devoted to interpreting "otherwise qualified" and to defining the duty of "reasonable accommodation" to determine what constitutes "discrimination." (This case is different. No one disputes that the plaintiffs are qualified,

"otherwise" or not, to do the job, and they seek no special accommodations.) Few courts have had the occasion to decide whether there was illegal discrimination against a handicapped person in the absence of these other issues. Rather, the difficult task facing most courts has been to decide when the failure to accommodate the handicapped constitutes illegal discrimination. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (deaf student rejected from clinical nursing program on the ground that her handicap would make her unqualified to practice as a nurse).

Thus, allegations of discrimination against the handicapped ordinarily encompass activity other than discriminatory treatment caused by overt prejudices, such as that alleged by the plaintiffs in the present case. Commentators have identified four types of discriminatory barriers that handicapped persons may confront when seeking employment: (1) intentional discrimination for reasons of social bias; (2) neutral standards with disparate impact; (3) surmountable barriers to the impaired; and (4) insurmountable barriers to the impaired. *Prewitt v. United States Postal Service*, 662 F.2d 292, 305 n. 19 (5th Cir. 1981) (citing Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U.L.Rev. 881, 883-84 (1980)).[13]

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[13] Most reported cases have addressed the latter three types of barriers because, perhaps, as the Supreme Court observed, most discrimination against the handicapped is due to apathy, not animus. *Alexander v. Choate*, 469 U.S. at 296, 105 S.Ct. at 717. In addition, the discrimination resulting from disparate impact, or from surmountable or insurmountable barriers present novel legal issues not previously settled by traditional employment discrimination jurisprudence.

The method of analysis and allocation of burdens of proof and production differ depending on what type of discrimination is at issue, and on whether the employer denies or acknowledges reliance on the plaintiff's handicap as a basis for its employment decision. In the present case, where plaintiffs seek no special accommodation and instead allege discrimination based on discriminatory intent and where defendants disavow any reliance on the plaintiffs' handicap, the analytic frameworks, employed in Title VII cases should apply. In *Doe v. New York Univ.*, 666 F.2d at 761, the court distinguished between the model of proof used in a case where the defendant disclaims any reliance on plaintiff's handicap as opposed to the more typical section 504 suit where defendant acknowledges reliance on plaintiff's handicap. In the former situation, which is similar to that presented in the case before this court, the *Doe v. N.Y.U.* court instructed that the standard Title VII models of proof might apply. *Id.*, 666 F.2d at 776. *See also, Prewitt*, 662 F.2d at 305 n. 19 (Title VII jurisprudence "for the most part applicable" to intentional social-bias discrimination against handicapped persons, and Title VII disparate impact decisions relevant in determining disparate impact handicap discrimination. In contrast, contentions concerning surmountable and insurmountable barriers raise issues peculiar to handicap discrimination law.)

The magistrate relied on *Doe v. N.Y.U.* to conclude that because plaintiffs had failed to show that they were excluded solely by reason of their handicap, they had thereby failed to establish a *prima facie* case of discrimination under section 504. The magistrate misread *Doe v. N.Y.U.* Where defendants disclaim any reliance on the

plaintiffs' handicap, as is the case here, *Doe v. N.Y.U.* suggests that a *prima facie* case can be established by proving that the plaintiff "applied for a position for which he was qualified and was rejected under circumstances indicating discrimination on the basis of an impermissible factor." *Id.* at 776. Thereafter, the burden shifts to the defendant to rebut the presumption of discrimination by coming forward with evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason. If the defendant does so, the burden then shifts back to the plaintiffs to demonstrate the proffered reason was not the true reason for the decision or that it encompassed unjustified consideration of the handicap itself, i.e., that the articulated reason is a pretext. *Id.* The ultimate burden, of course, remains with the plaintiffs. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In *Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372 (10th Cir.1981), the tenth circuit rejected the applicability of disparate treatment analysis to section 504 claims because it wished to avoid imposing the intent requirement of disparate treatment analysis. The court believed that "it would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown." *Id.* at 1385. We agree. In *Pushkin*, however, the defendant did not disclaim reliance on plaintiff's handicap; the trial court found that the university had rejected Pushkin because of his handicap. The question facing the court was whether a doctor with multiple sclerosis was "otherwise qualified" to serve in a psychiatric residency

program. The model of analysis we adopt would apply only in those cases where the defendant disavows any consideration of the plaintiff's handicap and the plaintiff alleges invidious discriminatory intent.

CONCLUSION

For the reason set forth, the case is REVERSED AND REMANDED for trial by jury on plaintiffs' claims of discrimination under section 504 of the Rehabilitation Act, plaintiffs' claims of discrimination under 42 U.S.C. § 1983, and all further proceedings consistent with this Opinion.

APPENDIX 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

GLENDA SMITH, Personal Representative of the Estate of Frank Smith, Deceased, and RAY MARTIN, Plaintiffs,	Civil No.: 84-1392
vs.	JUDGMENT
HOWARD BARTON, personally, and in his official capacity as Executive Director of the Idaho Commission for the Blind; LARRY BARNES, JACK UGAKI, and BRIAN WARDLE, personally, and in their official capacities as members of the Idaho Commission for the Blind, Defendants.	Filed Sept. 12, 1988

This action came on for trial before the Court sitting without a jury, the Honorable Mikel H. Williams, United States Magistrate, presiding, and the issues having been duly tried and the Court having duly rendered its findings of fact and conclusions of law,

IT IS ORDERED AND ADJUDGED, that the Plaintiffs take nothing in this action against the Defendants, that their actions be dismissed on the merits, and that the Defendants recover of the Plaintiffs, jointly and severally, their costs of action in the amount of $ ___ with interest thereon at the rate provided by law from the date hereof.

DATE this ___ day of ___, 1988.

/s/ Mikel H. Williams
Mikel H. Williams, Magistrate

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

GLENDA SMITH, et al., Plaintiffs,	)	Case No. 84-1392
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
HOWARD BARTON, et al., Defendants.	)	Filed August 1, 1988

INTRODUCTION

On September 21, 1984, the Plaintiffs commenced this action for injunctive relief and to recover damages based upon the Defendants' alleged discrimination against the Plaintiffs on account of their blindness and violation of the Plaintiffs' rights under the First and Fourteenth Amendments. After denial of Plaintiffs' Motion for a Preliminary Injunction which was affirmed on appeal and preliminary Motions for Summary Judgment, the case proceeded to trial on January 4, 1988, through January 8, 1988. The parties have submitted post-trials briefs and proposed Findings of Fact and Conclusions of Law. After considering all of the evidence, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Glenda Smith is the personal representative of the estate of Frank Smith. Frank Smith died following the commencement of this litigation and Glenda

Smith, his spouse, as personal representative of his estate, has been substituted as party Plaintiff.

2. Frank Smith (Smith) was employed at the Idaho Commission of the Blind (ICB) from 1969 until December 19, 1984. In March of 1982, Smith was appointed Chief of Field Services and served in that capacity for the remainder of his tenure at the ICB.

3. Frank Smith was blind at all times relevant to these proceedings.

4. Plaintiff Ray Martin (Martin) was employed at the ICB from August 11, 1975, through January 4, 1985. Martin was appointed interim supervisor of orientation in March of 1983 and acquired permanent status as Chief of Orientation in October of 1983. Martin served in that capacity for the remainder of his tenure at the ICB.

5. Smith and Martin were individuals with handicaps as defined in 29 U.S.C. § 706(8) at all times relevant hereto.

6. Defendant Howard Barton (Barton) is sighted and was first employed by the ICB in approximately November of 1968. In April of 1985, Barton was appointed Administrator and Executive Director of the ICB. Barton resigned from the ICB on December 31, 1982. On February 3, 1984, Barton was hired as acting administrator and executive director. On February 8, 1984, this position terminated due to an injunction issued by a state court. Barton was rehired as acting administrator and executive director on July 7, 1984, and became permanent administrator and executive director on March 22, 1985.

6. Defendant Larry Barnes is sighted and was a member of the ICB from 1977 through June 30, 1985.

7. Defendant Jack Ugaki (Ugaki) is sighted and has been a member of the ICB from July 1983 to the present.

8. Defendant Brian Wardle (Wardle) is and at all times relevant hereto was blind and was a member of the ICB from July 1, 1984, to June 30, 1987.

9. In July and August of 1984, the ICB was made aware through a legislative audit that if changes were not made at the ICB, the ICB may lose state and/or federal funding and the ICB might be consolidated with the State of Idaho division of Vocational Rehabilitation. A draft audit report identified significant problems at the ICB, including questionable eligibility determinations, poor selection of goals and services for clients, and poor documentation of case files.

10. In July of 1984, Barton developed a plan to reorganize the administrative structure of the ICB. Under the Reorganization Plan, Smith's position of chief of Field Services and the [sic] Martin's position of Chief of Orientation would be consolidated into one position – Chief of Rehabilitation Services.

11. Barton told Smith and Martin of the plan to restructure the ICB in August of 1984.

12. Barton testified that the purpose of the reorganization was to improve coordination of services between the Department of Field Services and the Orientation and Adjustment Center, efficiency of the ICB, eligibility determinations, selection of goals and services for clients, and documentation of case files; to prevent the ICB from

losing state or federal funding; and to prevent the ICB from being consolidated with the State of Idaho Department of Vocational Rehabilitation. The courts find Barton's testimony on this point to be credible and that he was not motivated by some ulterior motive.

13. The Reorganization Plan was not developed or implemented for the purpose of terminating or changing the employment status of Smith and Martin because of their blindness or their association with or expression on behalf of the National Federation of the Blind (NFB).

14. Barton presented the Reorganization Plan to the members of the ICB in a public meeting on September 5, 1984.

15. The members of the ICB unanimously approved the reorganization for the reasons expressed in Finding of Fact No. 12.

16. The members of the ICB did not approve the reorganization for the purpose of discriminating against Smith and Martin because of their blindness.

17. The members of the ICB did not approve the reorganization for the purpose of terminating or changing the employment status of Smith and Martin because of their association with or their expression on behalf of the NFB.

18. Smith and Martin were invited to apply for the new position of Chief of Rehabilitation Services and each, in fact, did so.

19. Edward Easterling also applied for the new position.

20. Plaintiffs and Easterling, who was eventually hired, possessed the necessary qualifications for the new position.

21. Edward Easterling was selected over the other candidates to fill the new position due to factors that Barton felt made him better qualified for the position. Barton hired Easterling because, as an employee of vocational rehabilitation, he had a better understanding of rehabilitation law, rules, and regulations than did the other candidates.

22. Easterling's score on the examination for the new position was higher than either Smith or Martin's score. Easterling scored an 88 while Martin scored an 87 and Smith scored an 85.

23. The position of Chief of Rehabilitation Services existed as a part of a program or activity receiving federal financial assistance.

24. Smith and Martin were not excluded from the position of Chief of Rehabilitation Services solely by reason of their handicaps.

25. There is no evidence that one of the qualifications for the new position was sightedness.

26. Smith and Martin were excluded from the position for reasons other than their handicaps.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1343(4).

2. Plaintiffs have asserted that they were discriminated against because they are blind, a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and because they are active members of the NFB, in violation of their First and Fourteenth Amendment rights.

3. The Plaintiffs' 42 U.S.C. §§ 1983, 1988 claims are precluded by the Rehabilitation Act. *See* Memorandum Opinion and Order, pp. 4-6 (February 24, 1987).

4. The Plaintiffs are precluded by the Eleventh Amendment from suing the Defendants in their official capacities except to the extent that Plaintiffs seek prospective injunctive relief. Memorandum Opinion and Order, p. 11 (February 24, 1987).

5. The Defendants are not entitled to qualified immunity because the law was clearly established, at all times relevant to these proceedings, that an employer who has a position which exists as part of a program or activity receiving federal financial assistance cannot discriminate against an otherwise qualified handicapped individual solely by reason of his handicap. *See* Memorandum Opinion and Order, pp. 3-4 (November 17, 1987).

6. The Rehabilitation Act of 1973 precludes recovery under 42 U.S.C. § 1983 for constitutional claims for which the underlying act provides a sufficiently comprehensive remedial devise. *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed.2d 746 (1984).

7. Plaintiffs' First and Fourteenth Amendment claims are precluded by the Rehabilitation Act. *Tyus v.*

Ohio Department of Youth Services, 606 F. Supp. 239 (S.D. Ohio 1985).

8. The Rehabilitation Act prohibits employment discrimination because of a person's association with the handicapped. *See Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982).

9. Plaintiffs' discrimination claims are brought pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

10. In order for the Plaintiffs to establish a *prima facie* case under Section 504, the Plaintiffs must establish (1) that they were handicapped persons under the Act, (2) that they were otherwise qualified for the position, (3) that they were excluded from the position solely by reason of their handicap, and (4) that the position exists as

part of a program or activity receiving federal financial assistance. *Doe v. New York University*, 666 F.2d 761, 774-775 (2d Cir. 1981).

11. There is no dispute that Plaintiffs were handicapped persons under the Act.

12. Plaintiffs were otherwise qualified for the positions they held prior to reorganization and for the position filled by Edward Easterling.

13. Plaintiffs have failed to establish that the reorganization and the hiring of Edward Easterling occurred under circumstances which give rise to an inference of discrimination based on their blindness.

14. There is no evidence that Plaintiffs' positions were merged because Plaintiffs were blind. The qualifications for Easterling's position did not include sightedness. There is no evidence that the Plaintiffs' positions would not have been merged if Plaintiffs were sighted. There is no evidence that Plaintiffs suffered from the reorganization because of their blindness. Accordingly, Plaintiffs failed to present evidence that the reorganization occurred solely by reason of their blindness or that they were excluded from the position occupied by Easterling solely by reason of their handicap.

15. The Idaho Commission for the Blind operated on federal and state funding.

16. Assuming a showing of disparate treatment is sufficient to establish a *prima facie* case, a plaintiff must establish that he was an otherwise qualified handicapped person apart from his handicap and was rejected under circumstances which give rise to an inference that his

rejection was based solely on his handicap. *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981).

17. Although Plaintiffs were otherwise qualified individuals, notwithstanding their handicaps, the commission was not reorganized nor were the Plaintiffs denied the position filled by Easterling under circumstances from which it can be inferred that their rejection was based solely on their handicaps.

18. A showing of disparate impact may be sufficient to establish a *prima facie* case but not all disparate impact showings constitute disparate impact. *Alexander v. Choate*, 469 U.S. 287, 105 s. [sic] Ct. 712, 719 (1985).

19. An otherwise qualified handicapped individual must be provided with meaningful access to a benefit offered by the recipient of federal financial assistance and the benefit cannot be defined in a way that effectively denies the otherwise qualified handicapped individual the meaningful access to which he is entitled. Therefore, the recipient of federal financial assistance may have to make reasonable accommodation in its program. *Id.*, at 720.

20. There is no evidence that the Plaintiffs' positions were merged because of their blindness. There is no evidence that one of the qualifications for Easterling's position was sightedness. There is no evidence that shows the positions would not have been consolidated if the Plaintiffs were sighted. The Plaintiffs have not suffered from the reorganization or the hiring of Easterling because of their blindness. In other words, Plaintiffs have failed to establish any actual disparate impact.

21. Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979).

22. The reorganization in this case was neutral on its face, did not rest on a discriminatory motive, and did not deny Smith or Martin access to or exclude them from the position now occupied by Easterling. Therefore, the effect of the reorganization does not rise to the level of disparate impact.

23. If a plaintiff is able to establish a *prima facie* case, the defendant has the burden of proving that the plaintiff had a relative lack of qualifications or that the plaintiff's rejection from the program was for reasons other than his handicap. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *See also Puskin* [sic], at 1387.

24. The reorganization of the Commission and the fact that Easterling's position was not filled by the Plaintiffs was based on reasons other than the Plaintiffs' handicaps.

25. Accordingly, the Court concludes that Plaintiffs are not entitled to any relief. The Defendants are directed to prepare an appropriate judgment and submit it to the Court, after first submitting it to the Plaintiffs for approval as to form and content.

DATED this 1 day of August, 1988.

/s/ Mikel H. Williams
MIKEL H. WILLIAMS
UNITED STATES MAGISTRATE

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FRANK SMITH and RAY MARTIN, Plaintiffs, vs. HOWARD BARTON, et al., Defendants.	Case No. 84-1392 MEMORANDUM OPINION AND ORDER Filed December 31, 1987

INTRODUCTION

This matter is presently before the Court on two different Motions filed by the Defendants. The Defendants in their first Motion request the Court to enter its order resetting this matter for a court trial based upon Defendants' belief that the Rehabilitation Act does not provide for jury trials. Secondly, the Defendants have filed a Motion in Limine requesting the Court to exclude certain types of evidence. As the Defendants' Motion in Limine depends in large part on whether this matter is tried by court or by jury, the Court will first address Defendants' Motion to reset this matter for a court trial.

JURY TRIAL

Any analysis of whether the Plaintiffs are entitled to a jury trial must begin with the Seventh Amendment. The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved. . . ."

The United States Supreme Court has construed the Seventh Amendment to require a jury trial on the merits in those actions that are analogous to "suits at common law." *Tull v. United States*, ___ U.S. ___, 107 S. Ct. 1831, 1835 (1987). This analysis applies irregardless of whether the cause of action is created by congressional enactment or exists at common law. *Curtis v. Loether*, 415 U.S. 189, 193, 94 S. Ct. 1005, 1007 (1974).

In *Tull*, the Supreme Court set forth the test for determining whether an action is analogous to "suits at common law" as follows:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. *See e.g., Pernell v. Southall Realty*, 416 U.S. 363, 378, 94 S. Ct. 1723, 1731, 40 L. Ed. 2d 198 (1974); *Dairy Queen, Inc., v. Wood*, 369 U.S. 469, 477, 872 S. Ct. 894, 899, 8 L. Ed. 2d 44 (1962). Second, we examine the remedy sought and determine whether it is legal or equitable in nature. *See e.g., Curtis v. Loether*, 415 U.S. at 196, 94 S. Ct. at 1009; *Ross v. Bernhard*, 396 U.S. 531, 542, 90 S. Ct. 733, 740, 24 L. Ed. 2d 729 (1970).

Tull v. United States, at 1835. The second inquiry, characterizing the relief sought, is far more important than finding a precisely analogous common law action. *Id.* at 1836, 1837.

The Rehabilitation Act is silent as to what remedies are available under § 504 for the private plaintiff. The

Supreme Court has held that a plaintiff who alleges intentional discrimination may bring an equitable action for back pay. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S. Ct. 1248, 1252 (1984). The Ninth Circuit, relying upon Darrone, has held that damages are an appropriate remedy under the Rehabilitation Act. *Kling v. County of Los Angeles*, 769 F.2d 532, 534 (1985). However, the Ninth Circuit has not ruled as to what these damages encompass.

In *Shuttleworth v. Broward County*, 649 F. Supp. 35, 38 (S.D. Fla. 1986), the Court concluded that the damages available under § 504 included reinstatement, back pay, and attorney fees. In *Walker v. Ford Motor Company*, 684 F.2d 1355, 1364 (11th Cir. 1982), the Eleventh Circuit concluded that compensatory and punitive damages are not available in § 504 actions. The *Walker* court noted that "compensatory damages" did not refer to back pay or restoration of other work-related benefits but instead referred to claims for emotional distress, pain and suffering, and consequential damages. *Id.* at 1364, n.16. Thus, it is clear that Plaintiffs are limited to reinstatement, back pay, restoration of other work-related benefits, and possibly attorney fees.

The Court, having determined what remedies are available to the § 504 plaintiff, finds that it is now possible to characterize the nature of the remedy sought. In *Slack v. Havens*, 522 F.2d 1091, 1093 (9th Cir. 1975), an employment discrimination case, the Ninth Circuit recognized that not all awards of monetary relief should necessarily be characterized as legal relief for the purposes of determining whether to grant a jury trial. The court went on to hold that an award of back pay was an integral part

of the equitable remedy of reinstatement. *Id.* at 1094. Thus, the court characterized a damage award for back pay as being equitable in nature. Similarly, the Sixth Circuit in *Equal Employment Opportunity Commission v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975), found that an award of back pay is a form of restitution and as such is equitable in nature. Accordingly, in the present case, the Court finds that Plaintiffs [sic] requested relief of reinstatement, back pay, restoration of work-related benefits, and attorney fees are all equitable in nature. Plaintiffs' relief being characterized as equitable, it naturally follows that a jury trial is not required.

This Court's holding that no jury trial is required is further supported by the fact that no right to a jury trial attaches in Title VII suits either. *See Slack*, at 1094, *EEOC v. Detroit Edison*, 515 F.2d 301, 308 (6th Cir. 1975); *Robinson v. Lorillard Corp.*, (4th Cir. 1971) 444 F.2d 791, 802, *cert.* dismissed under rule 60, (1971) 404 U.S. 1006, 92 S. Ct. 573, 30 L. Ed. 2d 655; *Johnson v. Georgia Highway Express, Inc.*, (5th Cir. 1969) 417 F.2d 1122, 1125; *cf. McFerren v. County Board of Education* (6th Cir. 1972) 455 F.2d 199, 202-04; *Harkless v. Sweeny Independent School District* (5th Cir. 1970) 427 F.2d 319, 324, *cert. denied*, (1971) 400 U.S. 991, 91 S. Ct. 451, 27 L. Ed. 2d 439; *Smith v. Hampton Training School* (4th Cir. 1966) 360 F.2d 577, 581 n. 8 (en banc). While the Court is aware that Title VII does not control whether a jury trial is necessary under the Rehabilitation Act, such a comparison is nevertheless appropriate since Plaintiffs' claims under the Rehabilitation Act are brought to redress alleged discrimination in employment, and Title VII was passed to redress discrimination

in the workplace as well. Accordingly, no jury trial need be provided the Plaintiffs.

MOTION IN LIMINE

The Defendants have filed a Motion in Limine concerning four areas:

> 1. That Plaintiffs be precluded from introducing into evidence the videotape deposition of Frank Smith on the grounds that the minimal probative value of the videotape deposition as opposed to the transcribed version of the deposition is greatly outweighed by its prejudicial effect;
>
> 2. That Plaintiffs be precluded from adducing from witnesses the opinion that this case in any way contributed to Frank Smith's death on the grounds that any such opinion would be without foundation and would be unfairly prejudicial;
>
> 3. That an instruction be given to the jury that the medication Frank Smith was taking at the time of his deposition may have affected his capacity; and
>
> 4. That Plaintiffs be precluded from calling any witness who was not identified in Answers to Interrogatories.

Counsel for the Defendants has indicated that if the Court grants their Motion resetting this matter for a court trial, their Motions with respect to the first three areas above are moot. As the Court has granted the Defendants' Motion, it will not rule on the first three areas above.

The preclusion of witnesses from testifying who have not been disclosed in answers to interrogatories is governed by Federal Rules of Civil Procedure 26(e). Rule 26(e) provides in pertinent part that:

> (e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

Thus, a party is under a continuing obligation to supplement his responses to interrogatories to furnish the names of prospective witnesses which have not previously been disclosed. The Advisory Committee Note to Rule 26(e) makes it clear that the Court may impose sanctions, including the exclusion of testimony, for the failure of a party to comply with Rule 26(e). *See also*, Wright & Miller, *Federal Practice4* [sic] *and Procedure: Civil § 2050*. Therefore, the Court may exclude as witnesses any person not disclosed in Plaintiffs' Answers to Interrogatories.

In the present case, the Defendants served interrogatories on the Plaintiffs which, among other things, requested Plaintiffs to identify their expert witnesses. Plaintiffs filed answers to those interrogatories but have

not supplemented their responses. Accordingly, Plaintiffs shall be precluded from calling in their case in chief as an expert witness any persons not identified as expert witnesses in Plaintiffs' December 4, 1985, Answers to Interrogatories.

ORDER

Based upon the above Memorandum Opinion and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion for Order Resetting Case for Trial by Court Sitting Without a Jury be and the same is hereby GRANTED;

IT IS FURTHER ORDERED that Defendants' Motion in Limine precluding Plaintiffs' expert witnesses who were not identified in Answers to Interrogatories from testifying be and the same is hereby GRANTED.

DATED this 31 day of December, 1987.

/s/ Mikel H. Williams
MIKEL H. WILLIAMS
UNITED STATES
MAGISTRATE